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TOBACCO WORKERS' AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL UNION NO. 232,
AFL-CIO, CLC

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

SHAMROCK FOODS COMPANY,

Respondent,

and

BAKERY, CONFECTIONERY, TOBACCO
WORKERS' AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL UNION
NO. 232, AFL-CIO, CLC,

Charging Party.

No. 28-CA-177035
28-CA-178621
28-CA-181714
28-CA-182541

MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Charging Party moves the Board for an order to reconsider its decision approving the blatant bribery of Thomas Wallace by Shamrock Foods.

First we quote extensively from the Brief of the General Counsel. We then add additional points which were not considered by the Board in its Decision and Order.

**II. THE CIRCUMSTANCES UNDER WHICH THE EMPLOYER BRIBED
THOMAS WALLACE**

A. PRIOR LITIGATION AND THE STATE OF THE UNION CAMPAIGN

Warehouse employees first began organizing support for the Union in late 2014. (JD 4:21-22; Tr. 416:23-417:3). Shortly after that, in January 2015, Respondent began holding

meetings with employees to “educate” them about unionization. (JD 4:27-29; Tr. 64:1-14). During the first of these meetings, employee Thomas Wallace (Wallace) spoke up in front of over a hundred of his coworkers asking questions about why other companies were unionized, but not Respondent. *Shamrock Foods Co.*, JD (SF)-05-16, at 4:27-32, 2016 WL 555903 (Div. of Judges, Feb. 11, 2016). Then, a couple months later, Wallace spoke up again at a town hall meeting where most of upper management, including Vice President of Human Resources Robert Beake (Beake), and the majority of his few hundred coworkers were present. This time, Wallace spoke up near the end of the meeting after Beake opened the floor for questions. Administrative Law Judge Jeffrey Wedekind (ALJ Wedekind) found, based on an audio recording of the meeting:

Beake asked if there were any other questions. Wallace at that point raised his hand and said, “Yeah. Is there any way we can get our old insurance back?” This question was immediately greeted with a burst of laughter and applause among the employees. When it subsided, Wallace continued, “You know, 300 million dollars. I mean it’s through the roof. Is that even being considered or anything?” JD (SF)-05-16 at 37:24-28. Within a week, Wallace was fired for his conduct at that meeting. *Id.* at 36:14-42:29. (See also JD 12:10-12, n.22).

The union campaign lost its steam after Respondent began meeting with employees and fired Wallace on April 6, 2015. (JD 14:6; Tr. 445:15-24). But employees, including Wallace, were holding out hope that Wallace would return to the warehouse; a signal that the Union could hold its own with Respondent and that employees’ right to organize would be protected and respected. (Tr. 462:17-465:13).

Based on Respondent’s conduct, some of which is addressed above, the Union filed a charge with the National Labor Relations Board (the NLRB) and Respondent’s initial responses to the campaign were the subject of the administrative hearing before ALJ Wedekind. (JD-(SF)-05-16). The NLRB also sought injunctive relief under Section 10(j) of the Act in the United States District Court of Arizona, based on Respondent’s conduct. (JD 9:32-33).

Wallace's reinstatement was central to the relief sought in that case. *Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH. (See also GCX 24).

While the injunctive proceeding was pending before the District Court, employees were not afraid to criticize Respondent's decision to discharge Wallace or express their hope that he would return to the warehouse. (JD 9:25-26; Tr. 418:3-419:14; GCX 22). In that regard, Wallace met with union organizers and employee Steve Phipps (Phipps), in front of the warehouse to picket in November 2015. (JD 9:23-25; Tr. 483:10-484:9). They held signs that read, "Workers United to Bring Tom Wallace Back." (JD 9:23-25; Tr. 483:13-16; GCX 23). Then, in early December 2015, employees passed out flyers in the warehouse discussing Respondent's unfair treatment of employees, specifically pointing out Wallace's discharge and informing employees that the case was awaiting a judge's decision. (JD 9:25-26; Tr. 418:3-419:14; GCX 22). Throughout this time, Wallace stayed in close contact with the Union and his former coworkers. (JD 12:16-17; Tr. 482:9-483:9).

The District Court ordered Respondent to offer Wallace his job back in the warehouse on February 1. *Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH, 2016 WL 8505125 (D. Ariz. Feb. 1, 2017), *affd.* No. 16-15172, 2017 WL 655795 (9th Cir., Feb. 17, 2017). (JD 12:13-14; GCX 24). Wallace, having been in regular contact with Phipps, the lead employee organizer, found out about the favorable decision right away. (Tr. 485:17-486:3). On February 2, Phipps sent Wallace a copy of the District Court's order, which he reviewed. (Tr. 485:25-487:7; GCX 24). After learning about the decision, Wallace was fully expecting to go back to work at the warehouse. (Tr. 487:15-19).

B. RESPONDENT REACTS TO THE DISTRICT COURT'S INJUNCTION BY OFFERING WALLACE A BRIBE

After the injunctive order issued, Respondent took steps to ensure that Wallace would never return to work at the warehouse for the obvious reason of preventing re-ignition of the campaign. On February 5, Wallace received a letter from Respondent, signed by Beake. (JD 12:28-35; Tr. 488:20-489:14). The letter, in relevant part, offered Wallace \$78,000 in

exchange for his “agreement to refuse (or ‘waive’) reinstatement at Shamrock.” (JD 12:28-35; GCX 9 at 1). The letter did not mention anything about paying Wallace any back wages or resolving any pending claims. (GCX 9). The letter also instructed Wallace to contact Heather Vines-Bright (Vines-Bright), Respondent’s Human Resources Manager by Friday, February 12, to let Respondent know whether he intended to return to work. (JD 12:37-38; Tr. 489:21-490:1; GCX 9 at 2).

In Wallace’s mind, the decision was clear. He would decline the monetary offer and return to work as he had been hoping to do all along. (JD 12:34-35; Tr. 489:15-20). So, he contacted Vines-Bright first thing on Monday, February 8. (JD 12:38-39; Tr. 489:21-490:1). Wallace left Vines-Bright a voicemail, and she called him back later that day. (Tr. 213:10-13; 490:13-24).

During this conversation, Wallace immediately informed Vines-Bright that he wanted to return to work and decline the offer. He asked her what his shift and schedule would be. (JD 12:38-40; Tr. 491:3-492:8). Vines-Bright responded that she was unsure how to move forward, but that she would call him back. (JD 12:38-40; Tr. 491:7-14). The conversation lasted about five to ten minutes. (Tr. 490:25-491:2).

In the meantime though, employees were busy littering the warehouse with bright red flyers announcing the District Court’s favorable decision. Phipps had organized about six other employees to help him pass out about 250 flyers beginning on February 9, which continued through February 11. While passing out the flyers, Phipps talked to his coworkers about the flyer and told them that Respondent would have to either give Wallace his job back at the warehouse or at least offer him his job back. (JD 12:20-24; Tr. 419:12-421:20; GCX 11). Phipps testified that a lot of employees were excited that Wallace was finally coming back to the warehouse, but others were still skeptical that it would actually happen. (JD 12:20-24; Tr. 424:4-4-14). See also *Shamrock Foods Co.*, JD (SF)-37-16 (Sept. 28, 2016), at 5:41-6:2.4.¹

¹ Phipps was actually disciplined for his conduct in passing out these flyers, which was the subject of litigation before ALJ Tracy. JD (SF)-37-16, affirmed 366 NLRB No. 107 (Shamrock II), *enfd.* 779 Fed. Appx. 752 (D.C. Cir 2019)

On that same day, February 9, Wallace spoke with Vines-Bright again in afternoon. (JD 12:41-13:1; Tr. 521:1-7). Vines-Bright told him what his schedule would be and then stated that the company was willing to offer an additional \$100,000 on top of the \$78,000 if he declined reinstatement. (JD 13:1; Tr. 492:10-493:10). This made the standing offer \$178,000. (Tr. 493:8-12). Wallace responded by saying, “Is that it?” But, he told Vines-Bright that he would talk it over with his wife. Before ending the conversation, Wallace asked Vines-Bright about Natalie Wright (Wright), a human resource specialist for Respondent.² He asked how Wright was doing and how her new baby was. (Tr. 493:17:494:5). The conversation ended after Wallace told Vines-Bright that he would get back to her. (Tr. 494:16-22).

After his second conversation with Vines-Bright, Wallace considered the \$178,000 offer but decided to turn it down because as he put it, “[i]t was worth more to the [Union] campaign and my return to decline that offer.” (Tr. 495:1-3; 520: 3-6). After being told that Respondent did not want Wallace to return to work, Wright called Wallace to follow up on February 10. (JD 13:1-3). The conversation began with some small talk and with Wright telling Wallace that she had heard that he inquired about her. (Tr. 495:8-21). Then, Wright asked Wallace, “How can I help you?” (Tr. 495:16-22). Wallace responded by telling her that he wanted to talk about the offer that had been presented. (Tr. 495:23-25). Then, Wright asked him whether he was accepting or declining the \$178,000 offer. (Tr. 496:1-3). Wallace responded by telling her that he was declining the offer, but if the company did not want him to return to work, he would take \$350,000 and three years of medical. (JD 13:4-5; Tr. 496:4-7). Wright responded with, “Whoa, whoa, whoa, whoa. I think that’s way too high. I don’t think the company is going to go for that.” (JD 13:6; Tr. 496:8-11).

Wallace responded by telling Wright that he did not think it was too high considering what he had been put through. He told Wright that she needed to go to the company and tell

² Prior to his discharge, Wallace had been working towards a degree related to human resources. He also used to talk about these aspirations with Wright and come in on his days off to get a feel for what she did as a human resource manager. (Tr. 234:1-15; 494:6-15).

them that “this is what it’s going to take” considering everything Respondent did to him and his family. (JD 13:6-7; Tr. 496:19-497:7). Then, Wallace offered something that had never been raised in prior conversations: Wallace informed Wright that he had an EEOC claim and was willing to drop it, “sweep it under the rug,” if they agreed to his counter offer. (Tr. 496:12-19).³ Wallace immediately followed this up by telling Wright that there were things that he knew that she did not know that would happen if he returned to work. He explained that the warehouse was going to go “bananas” because of all the union support and activity that was going on. (JD 13:6-8; Tr. 496:19-497:7). Wright told Wallace that she did not know if the company would approve the amount he asked for, but would talk it over with “them” and get back to him the next day. (Tr. 497:8-14).

Wright called Wallace back the next afternoon, on February 11. (JD 13:10; Tr. 498:21-499:4). She told him that the company was willing to come to a sum total of about \$214,000. (JD 13:10). Wallace told her that it sounded good, but he would have to call her back after he got home from picking up his kids from school and had a chance to talk with his wife. (Tr. 499:12-19). Wright responded that she needed to know right away because although she was not scheduled the next day, she was willing to come in to either draw up papers for his return or for the agreement. (Tr. 499:21-500:2).

After getting home, Wallace and his wife called Wright back. Wallace asked Wright to go over the numbers with them. Wright went over some information about the medical coverage that was included and discussed taxes with Wallace. (Tr. 500:1-501:9). Then, she said that she would send him a draft copy of the agreement, which she did by email later that day. (JD 13:10-11; Tr. 500:1-501:9; GCX 16). Wallace agreed to meet with Wright the following day, February 12, to sign the agreement. (Tr. 501:13-15).

³ The ALJ failed to note this sequence of events, which is not contradicted in the record. (Exc. 5).

Wallace showed up at the warehouse on February 12 to meet with Wright.⁴ Wright escorted Wallace to Vines-Bright's office. (Tr. 76:4-9; 238:15-239:15; 501:13-502:23).

Once there, only Wright and Wallace were present. (Tr. 239:16-18; 502:24-503:8). Wright first asked Wallace if he had any recording devices on him and said that she did not consent to being recorded. Wallace told her that he did not have anything like that on him. (Tr. 502:24-503:11). Wright gave him a copy of the final agreement to review, Wallace reviewed it, and then he signed it. (JD 13:11-12; Tr. 240:9-241:13; 503:12-504:1; GCX 8).

After signing the agreement, Wallace asked Wright if the company was going to blackball him with future employers. Wright responded that the company could only tell future employers what dates he was employed with the company. Wallace also mentioned to Wright that he thought it was "really unfortunate how things happened. ... All I wanted was to get my schooling done, advance myself, and become part of the team." (Tr. 504:15-20). Wright agreed with him and then told him that he should not "discuss what happened with anyone else" because he was going into human resources,⁵ and that "if this gets out, it won't look good[.]" (Tr. 504:21-25). Wallace just responded, "Okay." And then Wright asked Wallace if he would leave⁶ the premises, without hanging around.⁷

The final agreement signed by Wallace includes, *inter alia*, the following provisions:

In exchange for your decision to waive your right to return to work at Shamrock and the release of claims explained below, you will receive a check in the gross amount of \$214,270.30, less FICA and

⁴ Wright escorted Wallace to Vines-Bright's office. (Tr. 76:4-9; 238:15-239:15; 501:13-502:23).

⁵ Prior to meeting with Wright, Wallace attempted to speak with NLRB agents about the agreement because he wanted to make sure he "wasn't jeopardizing the case for the Union or anyone." (Tr. 531:11-13). He made these attempts on February 11, but was not able to actually speak with someone about it until after he signed the agreement. (Tr. 530:16-531:21).

⁶ Prior to getting discharged in the first place, Wallace was working towards a degree related to human resources. He also used to talk about these aspirations with Wright and come in on his days off to get a feel for what she did as a human resource manager. (Tr. 234:1-15; 494:6-15).

⁷ (Tr. 505:1-3). Wallace left and received his payment the following Monday. (Tr. 506:17-20).

Medicare tax deductions that are mandatory, despite your exempt status designation on your W-4. (GCX 8 at 1, ¶1).

...

It is understood that, in exchange for your Settlement Payment set forth in this letter, you release and waive the right to return to your former position with Shamrock. (GCX 8 at 1, ¶4).

...

You also waive any claimed right or opportunity to seek reemployment, reinstatement, new employment, or an independent contractor relationship with Shamrock or any of Shamrock's parent, subsidiary or affiliated entities, at any location, now or ever in the future, and agree that you will not apply for nor seek in any way to be reinstated, reemployed, retained or hired by any of them in the future. (GCX 8 at 2, ¶2).

...

Nothing in this Agreement is intended to, or shall, interfere with your ability to file or otherwise institute a charge with an administrative agency alleging discrimination under federal, state, or local civil rights, labor and/or employment discrimination laws (including, but not limited to, Title VII, the ADA, the NLRB, and the ADEA). However, you waive any right, and you shall not be eligible, to any relief, remedies, recovery, or monies in connection with any such charge against Shamrock, regardless of who filed or initiated any such compliant, charge, or proceeding. (GCX 8 at 2, ¶3).

...

You agree to reasonably cooperate with the Company in connection with any matter which you were involved or any existing or potential claim, investigation, administrative proceeding, lawsuit or other legal or business matter which arose⁸ during your employment by the Company, as reasonably requested by the Company. (GCX 8 at 3, ¶2 (numbered "4")).

There is no dispute that \$214,000 is well over the amount of money Wallace would have made in the 10-month period he was out of work. Loaders typically make about \$50,000 annually. (Tr. 71:3-16; 91:5-14; 219:19-22). Wallace's hourly rate was \$12/hour plus incentives which averaged \$27/hour. (JD at 12:25-26).

⁸ The ALJ failed to note this sequence of events. (Exc. 6-7) None of the testimony cited to was contradicted in the record.

C. INDIVIDUAL EMPLOYEES CANNOT CONTRACT AWAY THEIR RIGHTS

The Board and other courts have long held that individual employees cannot contract away rights guaranteed in the Act. See, e.g., *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940); *J.H. Stone & Sons*, 33 NLRB 1014, 1023 (1941) (finding contracts with employees unlawful for various reasons, including that they “were the fruit of the respondents’ interference, restraint, and coercion and had the purpose of defeating unionization”). Thus, where private “contracts [are] the fruits of unfair labor practices, stipulated by the employees of rights guaranteed by the Act, and [are] a continuing means of thwarting the policy of the Act, they [are] appropriate subjects for the affirmative remedial action of the Board[.]” *National Licorice Co.*, 309 U.S. at 361.

Here, Respondent’s individual agreement with Wallace was demonstrably intended to prevent Wallace from ever walking back into Respondent’s doors, in order to thwart the rights of its remaining employees to freely choose a representative to bargain on their behalf, by making the irreparable harm Wallace’s discharge caused to their organizing campaign permanent. In other words, Respondent’s agreement with Wallace was intended to undermine its other employees’ statutory rights. It is precisely this kind of use of individual contracts to thwart statutory rights that the Supreme Court found the Board must affirmatively remedy in *National Licorice Co.*, 309 U.S. at 361.

Consequently, the nature of the allegations, regardless of the potential private rights at interest, falls squarely within the appropriate subjects of remedial action before the Board.

D. THE BOARD ERRED IN ITS APPLICATION OF THE INDEPENDENT STAY FACTORS

1. Legal Standard

The guiding factors to consider in *Independent Stave*, 287 NLRB 740 (1987). include: (1) whether all parties, including the charging party, discriminatees and respondent are bound by the agreement and the position of the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there was any fraud, coercion, or duress by any

of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes. *Independent Stave*, 287 NLRB at 743. Applying those factors in *Clark Distribution*, the Board found that even though the discriminatees signed waivers and releases of all claims, the discriminatees did not waive their right to relief, in large part, because the waivers themselves were not “bona fide offer[s] of settlement, but [were] extended as part of a broader scheme to eliminate union supporters.” 336 NLRB at 750-751.

2. Analysis

Applying the same factors here, the Board should conclude that Wallace has not waived his right to relief under the Act. First, only Wallace and Respondent entered into the agreement, and Respondent completely bypassed the Charging Party and the General Counsel in soliciting Wallace to sign it. The Charging Party was not involved in the agreement and clearly opposes the outcome of it, as evidenced by its filing of the charge in Case 28-CA-181714, without Wallace’s knowledge. (GCX 1(e); Tr. 534:15-535:25). CGC also opposes the agreement Respondent offered and entered into with Wallace, hence the instant litigation. The Charging Party’s and CGC’s vigorous opposition should be given considerable weight. See *Frontier Foundries*, 312 NLRB 73, 74 (1993) (giving considerable weight to the General Counsel’s opposition to settlement).

The second factor under *Independent Stave* also weighs in favor of finding that the agreement should not be given effect. The agreement was not reasonable for many reasons, including because there is little to no risk at this stage of litigation for CGC. A favorable outcome before the Board with regard to Respondent’s conduct that gave rise to its desperate attempt to keep Wallace from returning to the warehouse is nearly inevitable. ALJ Wedekind’s decision was overwhelmingly supported by the record in the previous matter involving Wallace’s discharge. Further, the CGC also sought and obtained injunctive relief from the District Court, which was subsequently upheld by the Ninth Circuit Court of Appeals. *Overstreet v. Shamrock Foods Co.*, No. 16-15172, 2017 WL 655795. By the time Respondent made its offer to Wallace, the risk

inherent in the underlying litigation had all but shifted to Respondent. The Board affirmed the findings. 366 NLRB No 117 (2018) (Shamrock I), enf'd. 779 Fed. Appx 752 (D. C. Cir 2019).

With regard to the reasonableness of the agreement, the Board should also consider that there are outstanding un-remedied unfair labor practices. *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998). Along those same lines, the agreement here should be considered piecemeal at best. Wallace's reinstatement, while it would have had the greatest impact on organizing efforts, only constitutes a fraction of the remedies sought in the pending cases before the Board. This highlights the unreasonableness of the agreement.

Further, although Wallace signed the agreement waiving his right to reinstatement, the Board is charged with enforcing the Act, and, in doing so, must defend the public interest, and not just private rights. As the Ninth Circuit noted in upholding the District Court injunction requiring Respondent to offer Wallace immediate interim reinstatement:

Here, the Regional Director's claims with respect to Wallace's discharge are not moot. The National Labor Relations Board retains the authority to order

Wallace's reinstatement and other related remedies. "[T]he Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." *Indep. Stave Co.*, 287 N.L.R.B. 740, 741 (1987) (quoting *Robinson Freight Lines*, 117 N.L.R.B. 1483, 1485 (1957)). Likewise, "the Board has no statutory obligation to defer to private settlement agreements," although it "may defer in its discretion." *NLRB v. Int'l Bhd. of Elec. Workers, Local Union 112*, 992 F.2d 990, 992 (9th Cir. 1993). Given that the settlement agreement between Shamrock Foods and Wallace does not deprive the Board of its authority to order Wallace reinstated, and that "the underlying purpose of Section 10(j) is ... to preserve the Board's remedial power while it processes the charge," *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (internal quotations omitted), the Regional Director's petition for temporary relief with respect to Wallace's discharge is not moot.)

Overstreet v. Shamrock Foods Co., No. 16-15172, 2017 WL 655795, at *1.

Thus, although Wallace, as an individual, signed an agreement waiving reinstatement, there is a strong public interest in his reinstatement, since his discharge seriously interfered

with Respondent's employees' right to organize. For this reason as well, the agreement is unreasonable in light of the nature of the violations alleged.

The third factor also weighs in favor of finding relief appropriate under the Act. As discussed above, Respondent's conduct was coercive throughout its negotiations and interactions with Wallace. After Wallace plainly stated that he wanted to return to work, Respondent returned with a mind-blowing offer of \$178,000. Respondent also told him that he should not talk about the agreement with anyone and made sure that he left the premises immediately. For the reasons discussed above, Respondent's conduct was coercive throughout. Moreover, Respondent pressured Wallace to make a quick decision by not even giving him a day to consider its final offer. As Wallace explained, he did not even have time to discuss whether the agreement would jeopardize the underlying case in any way.

Furthermore, the agreement itself contains provisions that the Board would likely find coercive under the Act. For example, the agreement requires Wallace to "reasonably cooperate with [Respondent] in connection with any matter which [he was] involved or any existing or potential claim, investigation, administrative proceeding, lawsuit or other legal or business matter which arose during [his] employment by [Respondent], as reasonably requested by [Respondent]." (GCX 8). In *Beverly Health and Rehabilitation Services, Inc.*, 332 NLRB 347, 248-349 (2000), the Board found a rule requiring employees to cooperate in investigations to violate Section 8(a)(1) of the Act because the rule permitted employer conduct which would amount to interrogation under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), insofar as it permitted the employer to coerce employees to cooperate with an employer investigation of unfair labor practices. Similarly here, under the provision of the agreement, Respondent could call upon Wallace to disclose information he has about other employees' protected activity that may underlie future unfair labor practice charges. The coercive nature of the terms of the agreement themselves evidences that the circumstances under which Wallace signed the agreement were coercive. For the reasons discussed above, the Board should find that the third *Independent Stave* factor also weighs in favor of finding that relief was not waived.

The fourth and final factor also weighs in favor finding relief appropriate under the Act. Respondent has engaged in a history of violations of the Act. *Shamrock Foods Co.*, 337 NLRB 915 (2002) and cases cited in footnote 3 of slip opinion. In fact, Respondent's conduct has been so egregious that injunctive relief was sought and obtained. And, rather than comply with the Act, Respondent made a bald attempt to sabotage the rights of its employees by bypassing the General Counsel and the Union to offer Wallace a bribe. Respondent's conduct in offering and entering into the agreement with Wallace is just another flagrant illustration of Respondent's disregard of the Act.

For the forgoing reasons, the Board should rectify the ALJ's failure to apply *Independent Stave* in considering whether Wallace's waiver is a bar to relief and find that relief is still appropriate. The Board should further find that that the appropriate relief includes ordering Respondent to offer Wallace interim reinstatement pursuant to the Order dated February 1, 2016, issued by the United States District Court for the District of Arizona (Humetewa, J.), in *Overstreet v. Shamrock Foods Co.*, CV-15-01785-PHX-DJH, 2016 WL 8505125, and to comply with any make whole remedies ultimately ordered by the Board in Case 28-CA-150157.

E. THE BOARD ERRED IN APPLYING INDEPENDENT STATE FACTORS

First, contrary to the Board's conclusion, Tom Wallace did give up his Section 7 rights. He gave up the most critical Section 7 rights which was to campaign and advocate for the Union in the worksite. The Board has recently made it clear that face-to-face communications in the worksite are the heart of union campaigns. See *Caesars Entertainment*, 368 NLRB No. 143 (2019). The employees in the warehouse were deprived of their Section 7 rights because Tom Wallace was totally absent. His absence, moreover, was clear to the employees that the employer had successfully rid itself of one of the primary union adherents. The Board failed to take into account the Section 7 rights of the employees in the warehouse.

Wallace also gave up his Section 7 rights because he agreed not to work for related or affiliated companies. He thus gave up his right to engage in Section 7 activity with respect to employers of other employees. The Act preserves that right. See *Eastex v. NLRB*, 437 U.S. 556

(1978). The Board did not mention nor consider that he gave up his rights with respect to employees of other employers including as yet unnamed or unknown employers.

Wallace furthermore gave up his right to Section 7 activity because of the limiting restrictions regarding cooperating with the employer in future litigation. See paragraph beginning “You agree to reasonably cooperate with the Company ...” This encompasses and NLRB “litigation.”

Wallace also waived the right of the union or other employees to file charges with the Board. See paragraph “Nothing in this agreement is intended to ...” Although he may have waived his rights to a reinstatement remedy, he could not waive the right of the Union or other employees to seek a remedy for him.

The Release extends to any claims he may have under the Act with respect to employees of other employers mentioned in the settlement agreement. See paragraph “Nothing in this agreement is intended to ...”

His waiver of a right to employment includes unnamed and unknown entities. He specifically waived the right to work for “any of Shamrock’s parent, subsidiary or affiliated entities, at any location, now or ever in the future ...” That would include any facilities or companies that are purchased or became affiliated. He is also waiving his right to Section 7 activities.

The Board failed to recognize that Mr. Wallace was not a charging party. *Independent Stave* can’t reasonably be applied to individuals because they can’t settle the charges filed by Charging Party. Although the Board correctly notes that often the Board approves settlements, the Board has not cited a single case where it has approved a settlement by an individual employee over the objection of the Charging Party and the General Counsel, where the individual was not a charging party. See Decision, page 3, paragraph C.

The Board correctly found that there was animus. The Board correctly found that the sole purpose of the employer’s settlement was to ensure that Tom Wallace never returned to that facility or any other Shamrock facility. The sole purpose, then, was to prevent Section 7 activity.

Finally, although the Board refers to the EEOC discrimination charge, there is nothing in the record that shows there is any value to that charge. Thus, the Board is incorrect in saying “The settlement was a bona fide resolution of the multiple claims Wallace had asserted against the Respondent.” See page 3. At best, he asserted an unexplained and unestablished EEOC claim of disability discrimination when there was no evidence he had missed any work or had any such colorable claim. He had not asserted an unfair labor practice charge because that was done by the Union and not by Mr. Wallace.

There were not “multiple claims” as suggested by the Board.

The release also extends to other statutory claims about which there was no evidence of the existence of any such claim.

Finally he waived his section 7 right to jointly file claims with other employees or jointly pursue claims under multiple other statutes all of which allow concerted claims. This is another unlawful broad waiver of his section 7 rights and the section 7 rights of other employees to join with him in making such claims.

The effect of the employer’s bribe in this case was noted by the Board itself and the Administrative Law Judge. The employer rid itself of one of the primary union activists. The Board also made it clear to the employees that it would bribe them. The Board, in many cases, has found far smaller bribes to be unlawful. See, e.g., *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) and *Thorgren Tool & Molding*, 312 NLRB 628 (1993).

Here in this case this is dramatically illustrated. The Board found that granting minor benefits “such as more elaborate prizes and enhanced paid time at our annual banquet” Slip Opinion p 4, was an unlawful inducement or more correctly a bribe. How does the Board expect to explain to a reviewing court the grant of over \$200,000 to the open outspoken union activist is not unlawful in comparison?

The Board has repeatedly also found that an offer of benefits constituted a bribe, a violation of Section 8(a)(1) and (3). See *Maid In New York, Inc.*, 289 NLRB 524 (1988) and *McKenzie Engineering Co. v. NLRB*, 182 F.3d 662 (8th Cir. 1999).

The Board has also ignored the original separation agreement which Shamrock demanded Wallace sign which contained overbroad provisions. See Decision of ALJ Wedekind at pages 42-44.

Although the Board claims to have carefully considered the circumstances, the record demonstrates to the contrary. Tom Wallace was offered at least four times his back pay. The employer made it clear it didn't want him to return to work because he was a union activist. It bribed him and bought him out. This robbed employees of this facility and other named and unnamed Shamrock facilities of their section 7 rights.

The Charging Party did not agree to the settlement. The General Counsel did not agree to the settlement and, most importantly, this bribe had a substantial adverse effect upon the employees and their Section 7 rights.

III. CONCLUSION

For the reasons suggested above, the Board should not approve this bribe. It should find the settlement agreement to be an unlawful interference with Section 7 rights and unlawful discrimination by offering Wallace this settlement agreement.

Dated: February 3, 2020

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
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141390\1074520

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On March 10, 2020, I served the following documents in the manner described below:

MOTION FOR RECONSIDERATION

- ☒ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following parties in this action:

Via E-Filing

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 10, 2020, at Alameda, California.

/s/ Karen Kempler
Karen Kempler